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Michael Quillin

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# FUELING DEBATE: THE NINTH CIRCUIT'S ORDER TO REEVALUATE FUEL EFFICIENCY STANDARDS FOR LIGHTWEIGHT TRUCKS

*Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*<sup>1</sup>

## I. INTRODUCTION

On November 15, 2007, the Ninth Circuit struck down the National Highway and Traffic Safety Administration's (NHTSA's) proposed guidelines for controlling greenhouse gases emitted from vehicles.<sup>2</sup> The guidelines, known as the Corporate Average Fuel Economy ("CAFE") standards, included the first change in statutory fuel economy standards in over 30 years.<sup>3</sup> Since then, the demand for lightweight trucks (including SUVs) has skyrocketed.<sup>4</sup> Also, while the fuel efficiency of new cars and trucks, considered separately, has remained constant, the fuel efficiency of all new lightweight trucks has slipped significantly.<sup>5</sup> Without stricter regulations, even if trucks and cars maintain their current shares, the average fuel efficiency standards of all vehicles will continue to decline as newer vehicles replace older ones.<sup>6</sup> Fortunately, the court's decision holds the administration accountable for refusing to accept that greenhouse gas emissions have a significant negative impact on global warming.

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<sup>1</sup> 508 F.3d 508 (9<sup>th</sup> Cir. 2007). *See* 49 U.S.C. § 32909 (2000) ("A person that may be adversely affected by a regulation ... may apply for review of the regulation by filing a petition for review ... in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.").

<sup>2</sup> *Ctr. for Biological Diversity*, 508 F.3d at 508.

<sup>3</sup> Chris Holly, *U.S. Court Tosses CAFE Standards for Light Trucks*, 35 221 ENERGY DAILY, Nov. 19, 2007, 2007 WLNR 25514343. In 1975, the standards were introduced in response to the 1973-1974 oil embargo with the intent of spurring technological innovations that would conserve energy and oil. *See id.*

<sup>4</sup> *See* National Research Council, THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS 18-19 (National Academy Press 2002), available at [http://www.nap.edu/openbook.php?record\\_id=10172&page=18](http://www.nap.edu/openbook.php?record_id=10172&page=18).

<sup>5</sup> *See id.* at 19 ("[F]uel economy of new cars and trucks...has been essentially constant for about 15 years. However, the average fuel economy of all new light-duty vehicles slipped, from a peak of 25.9 mpg in 1987 to 24.0 mpg in 2000.").

<sup>6</sup> *See id.*

NHTSA's proposed requirements for light trucks were based on the vehicle's "footprint"<sup>7</sup> so that larger trucks have lower fuel economy targets than smaller trucks.<sup>8</sup> These differed from previous requirements which set fuel efficiency guidelines according a "backstop," or a minimum fleet-wide average, providing an incentive for manufacturers to produce small vehicles to offset the fuel economy standards of larger vehicles.<sup>9</sup> Without these incentives, the average overall weight of vehicles on the road will likely increase, and overall fuel efficiency will decrease. In its cost-benefit analysis, NHTSA reasoned that it is impossible to monetize the value of greenhouse gas emissions, and it did not want to limit a manufacturer's ability to meet market demands.

Eleven states,<sup>10</sup> the District of Columbia, the City of New York and four public interest organizations challenged the new rule, and the court held that the rule was arbitrary and capricious and that NHTSA's Environmental Assessment was inadequate because it failed to fully examine the greenhouse gas implications of its rulemaking in its cost-benefit analysis and failed to analyze reasonable alternatives or examine the rule's cumulative impact.<sup>11</sup> In its ruling, the Ninth Circuit issued a strong rebuke to the administration's policies on climate control, stating that NHTSA cannot set fuel economy standards that are contrary to Congress's purpose in enacting the Environmental Protection Control Act ("EPCA") – energy conservation.<sup>12</sup> The administration wants the

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<sup>7</sup> Opening Brief of Petitioners in Consolidated Cases at 18, *Ctr. for Biological Diversity*, 508 F.3d 508 (Nos. 06-72317 and 06-72641 consolidated). "Footprint" is defined as wheelbase times tire width. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The Petitioners included the states of California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont. *Ctr. for Biological* 508 F.3d at 508.

<sup>11</sup> Stephen L. Kass & Jean M. McCarroll, *Reforming U.S. Fuel Economy Standards* 1/2/2008 N.Y. L.J. 3, 1 (Jan. 2, 2008).

<sup>12</sup> *Federal Court Voids US Light-Duty Truck/SUV Reformed CAFE Regulations*, GREEN CAR CONGRESS, Nov. 16, 2007, <http://www.greencarcongress.com/2007/11/federal-court-v.html>.

appellate court to review the decision en banc,<sup>13</sup> arguing that it could not account for the value of reducing greenhouse gases in its cost-benefit analysis.<sup>14</sup> The administration's efforts to meet corporate interests run counter to the fight on global warming. Fortunately, this decision will force the administration to reexamine its policies and will create enough controversy to keep the policymakers, environmental lawyers and courts working toward a better solution for global climate change.<sup>15</sup> The days of weak environmental impact conclusions may well be over.<sup>16</sup>

## II. FACTS AND HOLDING

Over the past 20 years, consumer demand for midsize SUVs and other light-trucks has skyrocketed, and the proportion of vehicles subject to light truck fuel efficiency standards has increased accordingly.<sup>17</sup> Some models of SUVs, including the Ford Expedition and the Hummer, exceed the weight class of light trucks and are not subject to any fuel efficiency standards at all.<sup>18</sup> As a result, overall fuel efficiency of American automobiles has dropped since the mid-1980s, when fuel efficiency standards reached their current level.<sup>19</sup> Without new regulations, even if trucks and cars maintain their current shares, the average fuel efficiency

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<sup>13</sup> Harry Stoffer, *Bush Seeks to Save 2008-2011 CAFE Rules*, AUTOMOTIVE NEWS, Feb. 18, 2008, at 16; *Bush Administration Seeks to Soften CAFE Ruling*, WARMING LAW, Feb. 19, 2008, [http://warminglaw.typepad.com/my\\_weblog/2008/02/bush-administra.html](http://warminglaw.typepad.com/my_weblog/2008/02/bush-administra.html).

<sup>14</sup> Stoffer, *supra* note 13, at 16.

<sup>15</sup> Norman A. Dupont, *Quietly Releasing a Regulatory Beast*, Vol. 131 No. 232 THE RECORDER (San Francisco) Nov. 30, 2007, available at <http://www.biologicaldiversity.org/news/media-archive/CAFEcalLaw11-30-07.pdf>.

<sup>16</sup> *Id.* ("For state and local agencies, the easy days of environmental impact conclusions may well be over").

<sup>17</sup> COMMITTEE ON THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS ET AL., EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS, 14-23 (Duncan Brown ed., National Academy Press) (2002), available at [http://www.nap.edu/openbook.php?record\\_id=10172&page=18](http://www.nap.edu/openbook.php?record_id=10172&page=18).

<sup>18</sup> Adam Langton, *Rolling Over and Playing Dead: SUVs and the New CAFE Standards*, 4 POLICYMATTERS, Spring 2006, at 26, available at [http://www.policymatters.net/issue/PolicyMatters\\_Spring\\_2006.pdf](http://www.policymatters.net/issue/PolicyMatters_Spring_2006.pdf).

<sup>19</sup> *Id.* (citing COMMITTEE ON THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS ET AL., *supra* note 16, at 19).

standards of all vehicles will continue to decline as newer vehicles replace older ones.<sup>20</sup>

On March 28, 2006, the National Highway Traffic Safety Administration ("NHTSA") issued Reformed Corporate Average Fuel Economy ("CAFE") requirements<sup>21</sup> for light trucks (including Sport Utility Vehicles, minivans, and pickup trucks).<sup>22</sup> NHTSA provided a transition period lasting from 2008 through 2010, during which time the manufacturers may comply with either the Reformed regulation or Unreformed regulation.<sup>23</sup> For 2011 and beyond, manufacturers would be required to follow the Reformed CAFE standards.<sup>24</sup>

The Unreformed CAFE established a fleet-wide fuel economy standard that would apply as follows: 22.5 mpg for 2008, 23.1 mpg for 2009, and 23.5 mpg for 2010.<sup>25</sup> Under Unreformed CAFE, because manufacturers only have to meet a fleet-wide average, they could increase the number of small vehicles produced to balance out the larger vehicles in order to achieve the required CAFE standard. In the Reformed system, rather than having a single standard for all trucks, standards are based on the vehicle's "footprint," defined as wheelbase times tire width,<sup>26</sup> so that larger trucks have lower fuel economy targets than smaller trucks.<sup>27</sup> Since there is no longer a fleet-wide average mileage requirement under the

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<sup>20</sup> See COMMITTEE ON THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS ET AL., *supra* note 16, at 19. American transportation accounts for about 6 percent of the world's greenhouse gas emissions, and "improvements could have a significant impact on the rate of CO<sub>2</sub> accumulation in the atmosphere." *Ctr. for Biological Diversity v. Nat'l Highway Safety Admin.*, 508 F.3d 508, 547 (quoting COMMITTEE ON THE EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS ET AL., *supra* note 16, at 14); *see also* *Mass. v. EPA*, 127 S. Ct. 1438, 1457 (2007).

<sup>21</sup> Brief of Federal Respondents at 1, *Ctr. for Biological Diversity v. Nat'l Highway Safety Admin.*, 508 F.3d 508, (9<sup>th</sup> Cir. Mar. 7, 2007) (Nos. 06-71891, 06-72317, 06-72641, 06-72694, 06-73807, 06-73826), 2007 WL 1096332.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Opening Brief of the Petitioners in Consolidated Cases at 17, *Ctr. for Biological Diversity v. Nat'l Highway Safety Admin.* (9<sup>th</sup> Cir. Nov. 15, 2006) (Nos. 06-72317 and 06-72641 consolidated), 2006 WL 3884230.

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Id.*

Reformed system, there is no longer an incentive for manufacturers to produce small vehicles to offset the fuel economy standards of larger vehicles.<sup>28</sup> Therefore, a manufacturer could produce only larger SUV's or minivans that met the reduced efficiency standards for those vehicles.<sup>29</sup> NHTSA refused to impose a "backstop," or minimum average fuel economy standard, to prevent a significant reduction in fleet-wide fuel economy due to changes in fleet-size mix, claiming that such a mechanism would "limit a manufacturer's ability to respond to shifts in the market."<sup>30</sup>

In 2007, eleven states,<sup>31</sup> the District of Columbia, the City of New York, and four public interest organizations challenged the new rule.<sup>32</sup> The petitioners argued that the regulation was arbitrary, capricious and contrary to the Environmental Protection Control Act ("EPCA").<sup>33</sup> They "criticized NHTSA's cost-benefit analysis and calculations, the agency's failure to require a minimum average fuel economy standard, or 'backstop,' the perpetuation of the 'SUV loophole,' by which SUVs, minivans and pickup trucks were allowed to meet a less-stringent fuel economy standard than cars, even though such vehicles, like cars, are used primarily to carry passengers, and the failure to regulate most vehicles weighing between 8,500 and 10,000 pounds."<sup>34</sup>

Also, the petitioners argued that NHTSA's Environmental Assessment was inadequate because it failed to fully examine the greenhouse gas implications of its rulemaking and failed to analyze reasonable alternatives or examine the rule's cumulative impact.<sup>35</sup> The petitioners requested that the court order NHTSA to reevaluate their standards and prepare a full Environmental Impact Statement. NHTSA argued that the rule was not arbitrary and capricious or contrary to the

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 18-19.

<sup>31</sup> The petitioners included the states of California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508 (9<sup>th</sup> Cir. 2007).

<sup>32</sup> (31) *Ctr. for Biological Diversity*, 508 F.3d at 513.

<sup>33</sup> (32) *Id.*

<sup>34</sup> (33) *Kass*, *supra* note 11, at 1.

<sup>35</sup> *Ctr. for Biological Diversity*, 508 3d. at 514.

EPCA, their evaluation of the environmental consequences of the Final Rule was adequate and an Environmental Impact Statement was not required.<sup>36</sup>

The Ninth Circuit found that the rule was “arbitrary and capricious, contrary to the EPCA in its failure to monetize the value of carbon emissions, failure to set a backstop, failure to close the SUV loophole, and failure to set fuel economy standards for all vehicles in the 8,500 to 10,000 gross vehicle weight rating class.”<sup>37</sup> The court stated that the agency cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards. The court also held that “the Environmental Assessment was inadequate and that petitioners have raised a substantial question as to whether the Final Rule may have a significant impact on the environment.”<sup>38</sup> Therefore, the court remanded to NHTSA to set new standards as expeditiously as possible and to prepare a full Environmental Impact Statement.

### III. LEGAL BACKGROUND

#### A. *The Energy Policy and Conservation Act*

Congress passed the Energy Policy and Conservation Act (“EPCA”)<sup>39</sup> in the wake of the 1973-74 oil embargoes, intending to spur technological innovations that would conserve energy and oil.<sup>40</sup> Under the EPCA, the Secretary of Transportation can delegate authority to NHTSA to create CAFE regulations.<sup>41</sup> The statute provides that the

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Vehicles in the 8,500 – 10,000 lb. range include the Hummer and the Ford Expedition. Adam Langton, *Rolling Over and Playing Dead: SUVs and the New CAFE Standards*, 4 POLICYMATTERS, Spring 2006, at 26, available at [http://www.policymatters.net/issue/PolicyMatters\\_Spring\\_2006.pdf](http://www.policymatters.net/issue/PolicyMatters_Spring_2006.pdf).

<sup>38</sup> *Id.* at 531.

<sup>39</sup> 49 U.S.C. § 32902(a) (2000).

<sup>40</sup> *Federal Court Voids US Light-Duty Truck/SUV Reformed CAFE Regulations*, GREEN CAR CONGRESS, Nov. 16, 2007, <http://www.greencarcongress.com/2007/11/federal-court-v.html>.

<sup>41</sup> 49 C.F.R. § 1.50(f) (2000). NHTSA is delegated authority to “Carry out the functions vested in the Secretary by the Motor Vehicle Information and Cost Savings Act of 1972.” *Id.* See also 49 U.S.C. § 32902(a) (2000) (“[T]he Secretary of Transportation shall

regulation must be established “[a]t least 18 months before the beginning of each model year,”<sup>42</sup> and allows for “different standards for different classes of automobiles.”<sup>43</sup> Under the EPCA, the fuel economy standard for light trucks “shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.”<sup>44</sup> The statute identifies factors that the must be used to determine the maximum feasible fuel efficiency standards: “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.”<sup>45</sup> The EPCA provides an appellate process whereby “[a] person that may be adversely affected by a regulation ... may apply for review” in the D.C. Circuit or “in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.”<sup>46</sup> The EPCA preempts state laws so that a state “may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.”<sup>47</sup>

*B. The National Environmental Policy Act (“NEPA”)*

The NEPA has two main purposes: First, to “ensure that the agency ... will have available, and will carefully consider, detailed information concerning significant environmental impacts [, and second to] guarantee that the relevant information will be made available to the larger [public] audience.”<sup>48</sup> NEPA requires that an agency prepare an Environmental Impact Statement (“EIS”) for “major [f]ederal actions

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prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year”).

<sup>42</sup> 49 U.S.C. § 32902(a) (2000).

<sup>43</sup> *Id.* § 32902(k)(2).

<sup>44</sup> *Id.* § 32902(a).

<sup>45</sup> *Id.* § 32902(f).

<sup>46</sup> *Id.* § 32909(b).

<sup>47</sup> *Id.* § 32919(a).

<sup>48</sup> *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9<sup>th</sup> Cir. 1998).



significantly affecting the quality of the human environment.”<sup>49</sup> Under federal regulations interpreting NEPA,<sup>50</sup> “federal agencies prepare an environmental assessment (EA) to determine whether a proposed action is likely to have a significant impact on the environment, based on potential environmental impacts and alternatives.”<sup>51</sup> If the EA determines that the action will have a significant impact on the environment, the agency must prepare a thorough EIS.<sup>52</sup>

### *C. Corporate Average Fuel Economy (CAFE) Standards*

The CAFE regulations, like the EPCA,<sup>53</sup> divide categories of automobiles into passenger cars and light trucks. A passenger car “is any automobile (other than an automobile capable of off-highway operation) manufactured primarily for use in the transportation of not more than 10 individuals,”<sup>54</sup> and light trucks are all other automobiles.<sup>55</sup> In the regulation under review, “NHTSA amended the definition of a light truck, expanding the scope of the CAFE regulation to add medium duty passenger vehicles (MDPVs).”<sup>56</sup> “The MDPV definition essentially includes SUVs, short bed pick-up trucks, and passenger vans,”<sup>57</sup> none of which were specifically subject to previous CAFE standards. Under the prior (unreformed) CAFE regulations, “NHTSA established light truck fuel economy standards by designating a single average number, in miles per gallon (mpg), with which each manufacturer must comply.”<sup>58</sup> The same standard applied to every manufacturer of light trucks<sup>59</sup> and for Model

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<sup>49</sup> 42 U.S.C. § 4332(c) (2000).

<sup>50</sup> See 40 C.F.R. §§ 1500.1-1508.28 (2008).

<sup>51</sup> Brief of Federal Respondents, *supra* note 20, at 5-6..

<sup>52</sup> 42 U.S.C. § 4332(2)(C) (2000). If the EA determines that the action will have no significant impact on the environment, the NEPA does not require an EIS. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9<sup>th</sup> Cir. 1994).

<sup>53</sup> 49 U.S.C. § 32902(a)-(c) (2000).

<sup>54</sup> 49 C.F.R. § 523.4 (2008).

<sup>55</sup> See *id.* § 523.5.

<sup>56</sup> Brief of Federal Respondents, *supra* note 20, at 7.

<sup>57</sup> 71 Fed. Reg. 17,566, 17648 (Apr. 6, 2006).

<sup>58</sup> Brief of Federal Respondents, *supra* note 20, at 7..

<sup>59</sup> *Id.*; see also 49 C.F.R. § 533(a) (2008).

## FUEL EFFICIENCY STANDARDS FOR LIGHTWEIGHT TRUCKS

Year 2007, all light trucks were required to average 22.2 mpg.<sup>60</sup> In contrast, the Reformed CAFE regulations set target fuel economy levels for each vehicle “based on the vehicle’s footprint (a measure of size), and calculates the applicable CAFE standard for each manufacturer’s actual fleet mix.”<sup>61</sup> The new regulations provide higher fuel economy targets for vehicles with smaller footprints than for those with larger footprints.<sup>62</sup> “NHTSA projects that the overall average Reformed CAFE level for MY 2011 will be 24 mpg.”<sup>63</sup> NHTSA provides a three-year window (Model Years 2008-2010) in which manufacturers may choose to comply with either the unreformed regulations or the reformed regulations.<sup>64</sup> Beginning with Model Year 2011, the Reformed CAFE would govern exclusively.<sup>65</sup>

### IV. INSTANT DECISION

#### *A. Energy Policy and Conservation Act Issues*

The court examined seven issues related to the Energy Policy and Conservation Act (“EPCA”). First, the court addressed whether NHTSA is allowed to use marginal cost-benefit analysis to determine “maximum feasible average fuel economy level.”<sup>66</sup> Under the EPCA, the fuel economy standard for light trucks “shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.”<sup>67</sup> The statute identifies factors that must be used to determine the maximum feasible average including “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need

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<sup>60</sup> 49 C.F.R. 533.5(a) (2008).

<sup>61</sup> Brief of Federal Respondents, *supra* note 20, at 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see also 71 Fed. Reg. 17645 (Apr. 6, 2006).

<sup>64</sup> See 49 C.F.R. § 533.5(g) (2008).

<sup>65</sup> *Id.*

<sup>66</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 527 (9<sup>th</sup> Cir. 2007).

<sup>67</sup> 49 U.S.C. § 32902(a) (2000).

of the United States to conserve energy.”<sup>68</sup> However, NHTSA did not set forth its interpretation of the four factors.<sup>69</sup> Instead, relying on a decision over twenty years old,<sup>70</sup> NHTSA stated that in determining the “maximum feasible” fuel economy level, it should simply “assess[] what is technologically feasible for manufacturers to achieve without leading to adverse economic consequences, such as a significant loss of jobs or the unreasonable elimination of consumer choice.”<sup>71</sup> The court recognized that the EPCA “gives NHTSA discretion to decide how to balance the statutory factors – as long as NHTSA’s balancing does not undermine the fundamental purpose of the EPCA: energy conservation.”<sup>72</sup> However, the court found NHTSA’s reliance on a twenty-year-old decision unpersuasive because the need for energy conservation is more pressing today than it was twenty years ago, “when scientific knowledge of climate change and its causes were not as advanced as they are today.”<sup>73</sup> The court concluded that what was reasonable twenty years ago may not be reasonable today and NHTSA should more fully consider the four factors in determining the “maximum feasible” standard.<sup>74</sup>

Second, the court addressed NHTSA’s failure to monetize benefits of greenhouse gas emissions in its cost-benefit analysis. The court stated that “[e]ven if NHTSA may use a cost-benefit analysis to determine the “maximum feasible” fuel economy standard, it cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards.”<sup>75</sup> The agency argued that there is extremely wide

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<sup>68</sup> 49 U.S.C. § 32902(f) (2000); see also *Ctr. for Biological Diversity*, 508 F.3d at 529 (defining “maximum feasible” in 49 U.S.C. § 32902(a)) (2000).

<sup>69</sup> *Ctr. for Biological Diversity*, 508 F.3d at 529.

<sup>70</sup> *Pub. Citizen v. Nat’l Highway and Safety Admin.*, 848 F.2d 256 (D.C. Cir. 1988) (holding that “NHTSA’s ‘consideration of the likelihood of economic hardship within its assessment of ‘economic practicability’ must be accorded due weight.”).

<sup>71</sup> *Ctr. for Biological Diversity*, 508 F.3d at 529.

<sup>72</sup> *Id.* at 527 (citing *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1338 (D.C. Cir. 1986)).

<sup>73</sup> *Id.* at 530.

<sup>74</sup> *Ctr. for Biological Diversity*, 508 F.3d at 530-31.

<sup>75</sup> *Id.* at 531. While NHTSA failed to include the benefit of carbon emissions reduction in its analysis, it included an analysis of the employment and sales impacts of more stringent standards on manufacturers. *Id.* The court noted that the monetary benefit of carbon emissions reduction is well documented. *Id.* at 531 (citing *NRD Cmt.* at 8). The

variation in published estimates of economic benefits,<sup>76</sup> and therefore they should not be used. The court held that NHTSA's reasoning was arbitrary and capricious for several reasons.<sup>77</sup> First, the court noted that while there was a range of estimated values for carbon emissions reduction, the value is certainly greater than zero.<sup>78</sup> The court pointed out that NHTSA monetized other uncertain benefits, such as the reduction of criteria pollutants, crash, noise, and congestion costs.<sup>79</sup> Also, the court said that there "was no evidence to support NHTSA's conclusion that the appropriate course was not to monetize or quantify the value of carbon emissions reduction at all"<sup>80</sup> and no legal basis for NHTSA's contention that agencies may decline to adopt a particular monetary value when the costs and benefits are too uncertain.<sup>81</sup> According to the court, NHTSA "did not 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"<sup>82</sup> Lastly, the court found no evidence to

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Court cited NRDC figures for the benefit of carbon emissions reduction ranging from \$8 to \$26.50 per ton CO<sub>2</sub>, and a study published by the National Commission on Energy Policy which "found that measures mitigating climate change emissions have estimated benefits of \$3-19 per ton of carbon dioxide equivalent. The Commission recommends a price of \$7 per ton beginning in 2010 and then rising 5 percent each year." *NRD Cmt.* at 8. Also, the court noted that the Environmental Defense and the Union of Concerned Scientists recommended a minimum value of \$50 per ton carbon (or \$13.60 per ton CO<sub>2</sub>). *Environmental Defense Cmt.* at 6, A-4. "Valuing carbon emissions at \$50 per ton translates into approximately \$0.15 per gallon of gasoline saved." *Ctr. for Biological Diversity*, 508 F.3d at 527. NHTSA acknowledged several non-monetary benefits to the United States, including energy conservation, reduction on the nation's dependence on petroleum, economic growth, pollution reduction, and improved security of energy supply, but continued to view the value of greenhouse gas emissions as too uncertain to support a valuation among the savings in environmental externalities from reducing gasoline production and use. *Id.* at 532.

<sup>76</sup> (75) *Id.* at 532-33. The major sources include: costs from greenhouse gases; costs for controlling or avoiding their emission; and, costs of sequestering emissions that occur.

*Id.*

<sup>77</sup> (76) *Id.* at 533.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 534.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 535. The court said that NHTSA's conclusion that monetizing the value of carbon reduction would have affected the quality of the CAFE standard ran counter to the

support NHTSA's conclusion that "if it had accounted for the benefit of carbon emissions reduction, it would have had to account for the adverse safety effects downweighting,"<sup>83</sup> and the two would have balanced out, resulting in no change to the final CAFE standards."<sup>84</sup> Thus, the court remanded to NHTSA for it to include a monetized value in its analysis of CAFE standards.<sup>85</sup>

The third issue the court examined was NHTSA's vehicle safety analysis, and the fact that NHTSA omitted weight reduction for vehicles between 4,000 and 5,000 lbs. as a cost effective measure manufacturers could use to increase fuel economy.<sup>86</sup> The court said that there was significant evidence to show that weight reduction would achieve significant safety benefits;<sup>87</sup> however, in the guidelines, NHTSA applied a

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evidence, and NHTSA did not provide a satisfactory explanation for its failure to monetize. *Id.*

<sup>83</sup> Studies have shown that reducing the weight of trucks could have a negative safety impact, resulting in more rollovers and traffic-related fatalities. See Statement before the U.S. Senate Committee on Commerce, Science, and Transportation: CAFE Standards, Adrian K. Lund, January 24, 2002, *available at* [http://www.iihs.org/laws/testimony/pdf/testimony\\_akl\\_012302.pdf](http://www.iihs.org/laws/testimony/pdf/testimony_akl_012302.pdf). However, this argument is controversial with critics arguing that "if trucks are downsized and downweighted more than cars, the greater uniformity would reduce fatalities. There is even some evidence ... that proportionately reducing the mass of all vehicles would have a beneficial safety effect in vehicle collisions." SourceWatch, Fuel Efficiency Standards and the Laws of Physics, [http://www.sourcewatch.org/index.php?title=Fuel\\_efficiency\\_standards\\_and\\_the\\_laws\\_of\\_physics](http://www.sourcewatch.org/index.php?title=Fuel_efficiency_standards_and_the_laws_of_physics) (citing NATIONAL RESEARCH COUNCIL, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY STANDARDS 117 (2002)), *available at* <http://books.nap.edu/openbook.php?isbn=0309076013&page=117>).

<sup>84</sup> *Ctr. For Biological Diversity*, 508 F.3d at 535. The court found that NHTSA's assertion was based on the "controversial assumption that higher fuel economy standards for light trucks causes adverse safety effects from downweighting." *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 535-36.

<sup>87</sup> *Id.* at 536. "[T]otal fatalities in a hypothetical fleet of relatively modern passenger vehicles would be reduced by about .26 percent if all pickups and SUVs weighing more than 4,000 lbs. were replaced with pickups and SUVs weighing 3,400 to 4,000 lbs." *Id.* (quoting NATIONAL ACADEMY OF SCIENCES, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS 72 (2005)). Also, the NAS report noted that weight reduction would improve "crash compatibility," the variance between large and small vehicles, and that adverse safety effects of downweighting only apply to

“confidence bound”<sup>88</sup> of approximately 1,000 lbs. due to significant statistical uncertainty and used 5,000 lbs. as the threshold for considering weight reduction.<sup>89</sup> While the petitioners argued that the selection of a 1,000 lbs. confidence bound was arbitrary and capricious,<sup>90</sup> the court concluded that the petitioners did not sufficiently establish deficiencies in NHTSA’s reasoning.<sup>91</sup>

Fourth, the court examined the lack of a minimum average fuel economy standard, or “backstop,” in the Reformed CAFE. The court noted that Reformed CAFE, setting an individual fuel efficiency target based on a particular vehicle’s footprint,<sup>92</sup> plus a backstop, would prevent manufacturers from upsizing their fleet or producing a greater proportion of heavy vehicles, if the backstop were set high enough.<sup>93</sup> Under Unreformed CAFE, because manufacturers only had to meet a fleet-wide average, manufacturers could increase the number of small vehicles produced to balance out the larger vehicles in order to achieve the required CAFE standard.<sup>94</sup> NHTSA claimed that a backstop would “unduly limit consumer choice and perpetuate the problems with Unreformed CAFE.” The court allowed that “[n]either the EPCA’s language nor structure explicitly *requires* NHTSA to adopt a backstop.”<sup>95</sup> However, the court stated that Congress had directed the agency to set the CAFE level for

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smaller vehicles such as passenger cars, not light trucks. NATIONAL ACADEMY OF SCIENCES, at 72

<sup>88</sup> The source of the 1,000 lbs. confidence bound is an empirical study by Dr. Charles Kahane dealing with the crossover weight. *Ctr. For Biological Diversity*, 508 F.3d at 536.

<sup>89</sup> *Id.* at 536 (citing 71 Fed. Reg. 17627 (Apr. 6, 2006)).

<sup>90</sup> *Id.* Petitioners argued that the selection of a 1,000 lbs. confidence bound was arbitrary and capricious because the study’s 4,000 lbs. figure already accounted for uncertainty, and the confidence bound is taken from a different part of the study. *Id.*

<sup>91</sup> *Id.* at 537.

<sup>92</sup> *Id.* at 537 (stating that Reformed CAFE “links the level of the average fuel economy targets to the size of footprint so that there is an incentive to reduce weight only to the extent one can do so while also preserving size.”).

<sup>93</sup> *Id.* (stating that “Reformed CAFE (setting individual fuel economy targets for vehicles of every footprint size) plus a backstop (overall fleet-wide average) would prevent manufacturers from upsizing their vehicles or producing too many large footprint vehicles, if the backstop were set high enough.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 538.

light trucks at the “maximum feasible” level, and NHTSA failed to consider the relevant factors<sup>96</sup> in deciding whether to adopt a backstop.<sup>97</sup> The court held that while NHTSA is not precluded from considering consumer demand, it cannot place that issue above the fundamental purpose of the statute – energy conservation.<sup>98</sup> Thus, the court remanded to NHTSA to consider the proper factors<sup>99</sup> when deciding whether to adopt a backstop.<sup>100</sup>

Fifth, the court examined the transition period which permits manufacturers to choose to comply with Unreformed CAFE or Reformed CAFE in Model Years 2008-2010.<sup>101</sup> The court concluded that the transition period was not prohibited by the EPCA and the decision to have a transition period was not arbitrary and capricious.<sup>102</sup> The court gave two reasons for its decision. First, the transition period was not an exemption from the EPCA because the manufacturers must still comply with the CAFE program, but “they just have a choice as to which standard with which to comply.”<sup>103</sup> Second, NHTSA adequately explained the transition period, stating that it will minimize burdens on manufacturers during the transition period.<sup>104</sup> NHTSA also noted that “[m]anufacturers develop

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<sup>96</sup> *Id.* The court found that “maximum feasible” standards are to be determined in light of four factors: technological feasibility; economic practicability; the effect of other motor vehicle standards; and the need of the nation to conserve energy. *Id.*; see also 49 U.S.C. § 32902(f) (2000).

<sup>97</sup> *Ctr. for Biological Diversity*, 508 F.3d at 538.

<sup>98</sup> *Id.*

<sup>99</sup> The EPCA identifies four factors to consider: “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” 49 U.S.C. § 32902(f) (2000).

<sup>100</sup> *Ctr. for Biological Diversity*, 508 F.3d at 539.

<sup>101</sup> 71 Fed. Reg. 17593-95, 17639 (Apr. 6, 2006).

<sup>102</sup> *Ctr. for Biological Diversity*, 508 F.3d at 539.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* NHTSA stated that the transition period “‘will minimize the potential for unintended compliance burdens that may be experienced by a manufacturer as the result of shifting to a new regulatory structure,’ it is ‘critical given that this is the first comprehensive reform of the light truck CAFE program since its inception,’ and ‘the structure of the Reformed CAFE might require some manufacturers to revise their compliance strategies,’ since it ‘minimizes the ability of manufacturers to offset the low

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product plans for their fleets at least 5 years in advance, plans which incorporate consideration of CAFE compliance.”<sup>105</sup> Thus, the court held that the transition period was not arbitrary and capricious.

Sixth, the court examined NHTSA’s decision not to change the definition of passenger and nonpassenger automobiles, leaving open the SUV loophole.<sup>106</sup> NHTSA chose not to revise the distinction between passenger automobiles and light trucks,<sup>107</sup> saying that a revision would interfere with an otherwise orderly transition to Reformed CAFE (which will likely reduce the incentive to produce light trucks instead of passenger cars).<sup>108</sup> The court held that NHTSA’s decision not to change the definition was arbitrary and capricious for three reasons.<sup>109</sup> First, NHTSA failed to give a reasoned explanation for its claim that an orderly transition to Reformed CAFE could not be accomplished at the same time that the definitions are revised.<sup>110</sup> Second, NHTSA chose to look at the purpose for which a vehicle is manufactured rather than the consumer’s

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fuel economy performance of larger vehicles by increasing the production of smaller vehicles with higher fuel economies.” *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* The SUV loophole is a reference to the policy by which SUVs, minivans and pickup truck were allowed to meet a less-stringent fuel economy standard than cars, even though such vehicles, like cars, are used primarily to carry passengers, and the failure to regulate most vehicles weighing between 8,500 and 10,000 pounds. *Kass*, *supra* note 11, at 1.

<sup>107</sup> The EPCA defines “passenger automobile” as “an automobile that the Secretary decides by regulation is manufactured primarily for transporting not more than 10 individuals,” excluding “an automobile capable of off-highway operation that the Secretary decides ... has a significant feature except 4-wheel drive designed for off-highway operation” and is 4-wheel drive or more than 6,000 lbs. 49 U.S.C. § 32901(a)(18) (2000). “Non-passenger automobiles” are thus defined by exclusion. NHTSA defines an automobile other than a passenger automobile as a “light truck,” a term not used in the statute. 49 C.F.R. § 523.5(a) (2007). “Under 49 U.S.C. § 32901(a)(16), the Secretary has discretion to decide what constitutes a “passenger automobile” within the confines of the listed criteria.” *Ctr. for Biological Diversity*, 508 F.3d at 40.

<sup>108</sup> *Id.* at 540 (quoting Average fuel Economy Standards for Light Trucks; Model years 2008-2011, 70 Fed. Reg. 51422 (Aug. 30, 2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*



use of the vehicle,<sup>111</sup> overlooking the fact that many light trucks are actually built primarily for transporting passengers.<sup>112</sup> Third, the court stated that the decision ran contrary to "evidence showing that SUVs, vans, and pickup trucks are manufactured primarily for the purpose of transporting passengers and are generally not used for off-highway operation."<sup>113</sup> The court noted that the distinctions, originally created because work/cargo vehicles needed more power and different gearing than passenger vehicles, have broken down over time.<sup>114</sup> The court held that NHTSA's decision not to change the definition of a light truck was arbitrary and capricious, especially in light of the EPCA's goal of energy conservation.<sup>115</sup>

Seventh, the court examined NHTSA's decision not to regulate the fuel economy of vehicles between 8,500 and 10,000 lbs.. The court agreed with the petitioners that "fuel economy standards for these vehicles are feasible and will result in significant energy conservation."<sup>116</sup> The court held that NHTSA's reasoning that they should not be regulated now because they have not been regulated in the past was arbitrary and capricious.<sup>117</sup> Thus, the court remanded to NHTSA to create average fuel economy standards for these vehicles, or provide valid reasons for continuing to exclude them.<sup>118</sup>

### *B. National Environmental Policy Act Issues*

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<sup>111</sup> NHTSA argued that "it is a more objective way of differentiating between passenger and non-passenger automobiles." *Id.*

<sup>112</sup> *Id.* According to a study conducted by R.L. Polk & Co., 73% of light truck users use their trucks to carry passengers on a regular basis, 68% use them for personal trips on a regular basis, 58% use them for commuting on a regular basis, 59% never use them for towing, and 69% never use them for driving off-road. *Id.* at 541 (citing R.L. POLK & CO., PICKUP TRUCK USAGE STUDY (2005), available at [http://www.edf.org/documents/4872\\_PickupTruckSummary.pdf](http://www.edf.org/documents/4872_PickupTruckSummary.pdf)).

<sup>113</sup> *Id.* at 541. The court noted that the reason that consumers use light trucks as passenger vehicles is in large part because that is the way manufacturers have marketed the vehicles. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 542.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 545.

<sup>118</sup> *Id.*

The court examined two issues related to the NEPA. First, the court stated that the EPCA did not limit NHTSA's NEPA obligations to assess environmental impacts of its rule, including the impact on climate change.<sup>119</sup> The court noted that the goals of the two acts are complementary, not exclusive. Specifically, the EPCA's goal of energy conservation complements the NEPA's goals of "help[ing] public officials make decisions that are based on understanding of environmental consequences"<sup>120</sup> and "insur[ing] that environmental information is available to public officials and citizens before decisions are made and before actions are taken."<sup>121</sup> Thus, the NEPA did not limit NHTSA's obligations to assess environmental impacts.

Second, the court examined the sufficiency of NHTSA's Environmental Assessment, concluding that the analysis was inadequate.<sup>122</sup> The court said that NHTSA did not adequately consider and elaborate the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment.<sup>123</sup> The court cited NHTSA's failure to discuss the actual environmental effects from emissions from light trucks or to place those emissions in context of other CAFE rules.<sup>124</sup> According to the court, the impact of greenhouse gas emissions is "precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."<sup>125</sup> Also, the court noted NHTSA's failure to fully explore reasonable alternatives,<sup>126</sup>

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<sup>119</sup> *Id.* at 547.

<sup>120</sup> 40 C.F.R. § 1500.1(c) (2008).

<sup>121</sup> *Id.* § 1500.1(b).

<sup>122</sup> *Ctr. for Biological Diversity*, 508 F.3d at 549.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 549. NHTSA contends that Congress is at fault for the fact that the new standards will not offset the projected effect of increases in the number of light trucks, because Congress made the decision when writing the EPCA to require CAFE standards to be technologically feasible and economically practical. *Id.* "NHTSA concludes from this that it has no obligation to assess the cumulative impact of its rule on climate change." *Id.*

<sup>125</sup> *Id.* at 550. "Any given rule setting a CAFE standard might have an 'individually minor' effect on the environment, but these rules are 'collectively significant actions taking place over a period of time.'" *Id.* (citing 40 C.F.R. § 1508.7 (2000)).

<sup>126</sup> *Id.* at 551. The agency justified the use of alternatives that had a very narrow range of impacts on the grounds that "standards more stringent than those represented by the

saying that consideration of more stringent fuel economy standards is clearly related to the EPCA's goal of energy conservation and should be fully examined.<sup>127</sup> The court held that NHTSA's determination that no Environmental Impact Statement ("EIS") is required<sup>128</sup> was arbitrary and capricious. The court recognized that even a slight increase in the rate of greenhouse gas emissions could have a significant impact because there might be an unknown tipping point for climate change, and NHTSA must prepare an EIS to address these concerns.<sup>129</sup>

## V. COMMENT

In an effort to meet corporate interests, the administration wants to slow the fight against global warming,<sup>130</sup> taking steps that are unlikely to result in any significant reduction of greenhouse gas emissions.<sup>131</sup> In March 2006, NHTSA approved an increase of light truck fuel efficiency standards from an average of about 21.6 miles per gallon to an average of 24 miles per gallon by 2011.<sup>132</sup> Fortunately, in a ruling that holds the administration accountable for refusing to recognize the significant effects of greenhouse gas emissions, the Ninth Circuit overturned the standards, stating that NHTSA did not properly assess the standards' environmental risk.<sup>133</sup> The court stated that "NHTSA cannot set fuel economy standards

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alternatives would not satisfy the statutory requirement to establish standards... that are both technologically feasible and economically practicable..." *Id.* at 552. The court noted that NHTSA was once again falling back on its contention that it had no discretion to consider higher standards, an argument the court found flawed. *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 548. NHTSA argued that its rule "will not have a significant effect on the human environment," explaining that "compared to the 'baseline alternative or extending the MY 2007 light truck CAFE standard through MYs 2008-2011, its evaluated alternative would have a minor beneficial impact on various environmental resources" since it "would produce, compared to U.S. emissions of CO<sub>2</sub>, a small decrease in emissions of CO<sub>2</sub>, the primary component of greenhouse gas emissions." *Id.*

<sup>129</sup> *Id.* at 554.

<sup>130</sup> Kass, *supra* note 11, at 3.

<sup>131</sup> Stoffer, *supra* note 13.

<sup>132</sup> Peter Haldis, *U.S. Court Strikes Down Light Truck CAFE Standards*, GLOBAL REFINING & FUELS REPORT 2007, 2007 WLNR 23362231, Nov. 21, 2007.

<sup>133</sup> *Id.*

that are contrary to Congress's purpose in enacting the EPCA – energy conservation.”<sup>134</sup> As the court recognized, even a slight increase in the rate of greenhouse gas emissions could have a significant impact because there might be an unknown tipping point for climate change.<sup>135</sup> Thus, the ruling requires NHTSA to “undertake a wholesale reworking of the corporate average fuel economy”<sup>136</sup> program established by Congress in the EPCA of 1975.<sup>137</sup>

While the court remanded to NHTSA to set new standards as expeditiously as possible,<sup>138</sup> it appears too late for the administration to effectively follow the ruling. Under EPCA, automakers must get at least 18 months of lead time to adjust to changes in fuel economy standards. It is “already too late to revise rules for the 2009 model year.”<sup>139</sup> Changes for the 2010 model year would have to take effect by April 1, 2008 and that is unlikely to occur as well.<sup>140</sup>

On the bright side, this ruling holds the administration accountable for refusing to accept the realities of global warming and forces them to start taking responsible actions.<sup>141</sup> This case will have a positive impact on a variety of federal activities. “While the case largely involved one specific set of federal regulations, the court’s rationale may be applicable to other regulatory problems implemented by other agencies.”<sup>142</sup> The court made it clear that NHTSA and other agencies must consider climate

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<sup>134</sup> *Ctr. for Biological Diversity*, 508 F.3d at 530.

<sup>135</sup> Dupont, *supra* note 15, at 5.

<sup>136</sup> Holly, *supra* note 3.

<sup>137</sup> *Id.*

<sup>138</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508 (9<sup>th</sup> Cir. 2007).

<sup>139</sup> Stoffer, *supra* note 13, at 16.

<sup>140</sup> *Id.*

<sup>141</sup> *Federal Court Finds Bush Administration Violated Law by Ignoring Global Warming in Setting National Gas Mileage Standards, Rejects Loophole for Trucks and SUVs*, Stanford Law School News Center [website], November 15, 2007, available at [http://www.law.stanford.edu/news/pr/74/Federal Court Finds Bush Administration Violated Law by Ignoring Global Warming in Setting National Gas Mileage Standards, Rejects Loophole for Trucks and SUVs](http://www.law.stanford.edu/news/pr/74/Federal_Court_Finds_Bush_Administration_Violated_Law_by_Ignoring_Global_Warming_in_Setting_National_Gas_Mileage_Standards_Rejects_Loophole_for_Trucks_and_SUVs).

<sup>142</sup> *Id.*

change in rulemaking proceedings.<sup>143</sup> The court stated that “the fact that climate change is largely a global phenomenon that includes actions that are outside of the agency’s control ... does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming.”<sup>144</sup> Agencies can no longer count on rubber stamp approval or an easy finding of “no significant impact” under the NEPA.<sup>145</sup> “The fact that almost any new project could ostensibly be argued to have cumulative effects on global warming, [means that] NEPA ... analyses have just gotten a whole lot more complicated.”<sup>146</sup>

This case illustrates the courts’ growing recognition that global warming poses major risks to our planet and is significantly affected by human activity.<sup>147</sup> From now on, environmental groups can seize upon the court’s ruling to force “federal agencies, project developers, the investment community and other interested parties” to consider climate change issues and defend their decision-making processes in court.<sup>148</sup>

The administration wants the appeals court to review the decision en banc.<sup>149</sup> The administration contends that it is impossible to account for the value of reducing greenhouse gas emissions in a cost-benefit

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<sup>143</sup> Climate Intel, Landmark Decision on Fuel Economy Standards, Nov. 16, 2007, <http://climateintel.com/2007/11/16/landmark-decision-on-fuel-economy-standards/>; see also *Ctr. for Biological Diversity*, 508 F.3d at 550.

<sup>144</sup> *Id.*

<sup>145</sup> Dupont, *supra* note 15, at 5.

<sup>146</sup> *Id.*

<sup>147</sup> Kass, *supra* note 11, at 3.

<sup>148</sup> Stoffer, *supra* note 13. Environmentalists contend that congressional action is necessary because “legislation is ‘always more certain’ because it is immune from legal challenges.” Court Ruling, Gas Prices May Spur Congressional Action on CAFE, Vol. 18 Issue 24 CLEAN AIR REPORT (Nov. 29, 2007). Congress is already considering legislation that would tighten the CAFE standard for cars and light trucks. Senate-approved legislation would require light trucks and cars to achieve a standard of 35 miles per gallon by 2022. Democratic leaders are in the final stages of writing a final energy bill that is expected to include a higher CAFE standard. “Enactment of the legislation would moot” the Ninth Circuit’s decision. Holly, *supra* note 3.

<sup>149</sup> *Bush Administration Seeks to Soften CAFÉ Ruling*, Warming Law: Changing the Climate in the Courts, [http://warminglaw.typepad.com/my\\_weblog/2008/02/bush-administra.html](http://warminglaw.typepad.com/my_weblog/2008/02/bush-administra.html).

analysis.<sup>150</sup> In the instant decision, the Ninth Circuit rejected that assertion and also rejected the way NHTSA distinguishes cars from trucks in the corporate average fuel economy program.<sup>151</sup> Environmentalists contend that the appeal is frivolous and “intended for delay, to help the automakers to continue for a little longer making unacceptable gas guzzlers.”<sup>152</sup> The good news is that these cases are likely to fuel enough controversy to keep the policymakers, environmental lawyers, and courts working toward a better solution. For state and federal agencies, the easy days of environmental impact conclusions may be over.<sup>153</sup>

## VI. CONCLUSION

For the first time since 1975, NHTSA proposed new guidelines for controlling greenhouse gases emitted from vehicles.<sup>154</sup> If approved, the guidelines would have been a step backwards in the fight against global warming. Because the new guidelines were based on a given vehicle’s footprint instead of a manufacturer’s fleet-wide average, they allowed for a decrease in overall fuel efficiency.

Fortunately, the Ninth Circuit found the guidelines arbitrary and capricious and NHTSA’s Environmental Assessment inadequate because it failed to fully examine the greenhouse gas implications of its rulemaking and failed to analyze reasonable alternatives or examine the rule’s cumulative impact.<sup>155</sup> The court stated that NHTSA cannot set fuel economy standards that are contrary to Congress’s purpose in enacting the Environmental Protection Control Act (“EPCA”) – energy

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<sup>150</sup> See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 534 (9<sup>th</sup> Cir. 2007).

<sup>151</sup> *Id.*

<sup>152</sup> *Bush Administration Seeks to Soften CAFÉ Ruling*, Warming Law: Changing the Climate in the Courts, [http://warminglaw.typepad.com/my\\_weblog/2008/02/bush-administra.html](http://warminglaw.typepad.com/my_weblog/2008/02/bush-administra.html) (quoting California Attorney General, Jerry Brown).

<sup>153</sup> Dupont, *supra* note 15, at 5.

<sup>154</sup> Holly, *supra* note 3. In 1975, the standards were introduced in response to the 1973-1974 oil embargo with the intent of spurring technological innovations that would conserve energy and oil. *Federal Court Voids US Light-Duty Truck/SUV Reformed CAFE Regulations*, Green Car Congress, <http://www.greencarcongress.com/2007/11/federal-court-v.html>

<sup>155</sup> Kass, *supra* note 11, at 3.

conservation.<sup>156</sup> The decision offers a strong rebuke of the administration's policies on global warming and provides an incentive for policy-makers, legislators and courts to work toward better solutions.

MICHAEL J. QUILLIN

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<sup>156</sup> *Federal Court Voids US Light-Duty Truck/SUV Reformed CAFE Regulations*, *supra* note 154.